

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500

Washington, DC 20011

Telephone No.: (202) 434-9958

Fax No.: (202) 434-9949

February 28, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-22
Petitioner	:	A. C. No. 46-08266-66818
	:	
	:	Docket No. WEVA 2006-37
	:	A. C. No. 46-08266-69749
v.	:	
	:	
BLACK HAWK MINING,	:	Mine: Josephine No. 3
Respondent	:	
	:	
	:	

AMENDED ORDER TO SUBMIT ADDITIONAL INFORMATION *

These cases concern proposals for assessment of civil penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)), seeking the assessment of 11 alleged violations of mandatory safety standards found in Parts 75 and 50, Title 30, Code of Federal Regulations.

On January 17, 2006, the Commission received the Secretary's Motion for Settlement. In her motion, the Secretary states that the parties propose to reduce the total assessment for the 11 violations, including one violation issued as a result of a serious injury, from \$62,825.00 to \$16,078.00. This 74% reduction was based upon the Secretary's review of the factual circumstances and "other relevant criteria," including Section 110(i) criteria and the fact that New South Resources dba Black Hawk Mining filed for Chapter 11 Bankruptcy in August 2002 and ceased business in November 2005.

Congress stressed the importance of reviewing proposed settlements in an open and public manner and has placed a heavy burden on the Commission and its judges to provide this oversight. S. Rep. No. 181, 95th Cong., 1st Sess. 44-45 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632-633 (1978) ("Legis. Hist."); 30 U.S.C. § 820(k). It is the judge's responsibility, regardless of whether both parties have agreed on a settlement, to determine the appropriate penalty amount, in accordance with the six criteria set forth in Section 110(i) of the Act. *Sellersburg Stone Co.*, 736 F.2d 1147, 1151 (7th Cir. 1984).

Judges must consider all six of the criteria and are obliged to direct the parties to supplement the record as required for them to discharge this duty. *See, e.g., Sec'y of Labor on behalf of Hanna v. Consolidated Coal Co.*, 20 FMSHC 1293, 1303 (Dec. 1998). Findings of fact on each of the statutory criteria provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, while also providing the "Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-293 (Mar. 1983).

In addition to the criteria laid out in section 110(i), the Commission and its judges must "assure that the public interest is adequately protected before approval of any reduction in penalties." Conf. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legis. Hist.* at 633. Section 110(k) of the Mine Act requires judges to protect the public interest by ensuring that all settlements are consistent with the Mine Act's objectives. *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). As former Chief Administrative Law Judge Paul Merlin stated:

Under the Mine Safety Act unlike most statutes, the administrative law judge has the affirmative duty to approve a settlement, even if the parties themselves have agreed upon its terms. Under this law *the judge does not have to approve a settlement, if he determines it is not in the public's interest*. In other words, the judge is here to guarantee the public interest

Explo-Tech Inc., 16 FMSHRC 931, 933 (Apr. 1994) (ALJ) (emphasis added).

The Secretary has failed to provide adequate evidence to support the proposed settlement under the six criteria of Section 110(i). At a minimum, the parties must provide evidence to support the assertion that the settlement penalty is justified under each of the six criteria. Thus, I must deny the subject motion unless the parties supplement the record with support showing how the penalty amount adequately considers each of the six criteria in Section 110(i).

Judges are required to verify the merits of a proposed settlement to determine if it protects the public interest. However, the judge cannot safeguard Congress' first priority - the health and safety of the miner - when the parties do not document their assertions. The parties provided no evidence to suggest that the 74% reduction in assessed penalty supports the public's interest. Additionally, the settlement motion fails to discuss any of the facts surrounding the accident or identify with specificity the reasons for the proposed reduction.

THEREFORE, it is **ORDERED** that the parties submit the required additional information and any supporting documentation within 15 days of the date of this order. I am mindful that the parties may desire to keep sensitive financial information confidential. If so, the parties may submit any documents to me for *in camera* review and may request that they be placed under seal subject to further review only by the Commission or a higher appellate body. Failure to comply with this order will result in the denial of the settlement motion.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

Richard D. Hosch, Esquire, U.S. Department of Labor, Mine Safety and Health Administration,
100 Bluestone Road, Mt. Hope, WV 25880-1000

David J. Hardy, Esquire, Spilman Thomas & Battle, PLLC, 300 Kanawha Blvd., East, P. O. Box
273, Charleston, WV 25321-0273

**this is a corrected version that was re-issued March 6, 2006*